

EBSA Response to Draft Report

U.S. Department of Labor

Assistant Secretary for
Employee Benefits Security Administration
Washington, D.C. 20210



DATE: **SEP 29 2011**

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: PHYLLIS C. BORZI *Phyllis C. Borzi*
Assistant Secretary for Employee Benefits Security

SUBJECT: EBSA Response to OIG Performance Audit
Draft Audit Report Number 09-11-003-12-121

Thank you for the opportunity to comment on the recommendations in your above referenced Performance Audit Report on our implementation of the Patient Protection and Affordable Care Act of 2010 (PPACA).

The Employee Benefits Security Administration (EBSA) is responsible for the administration and enforcement of the civil and criminal provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) and related criminal statutes. EBSA oversees approximately 718,000 private retirement plans, 2.6 million health plans, and similar numbers of other welfare benefit plans, such as those providing life or disability insurance. The employee benefit plans under our jurisdiction hold approximately \$6.5 trillion in assets and cover approximately 150 million participants and beneficiaries.

When President Barack Obama signed the PPACA, P.L. 111-148 on March 23, 2010, this historic health care reform legislation gave more than 32 million Americans access to medical coverage. The PPACA assigned significant new regulatory, enforcement, and outreach responsibilities to the Department and more specifically, EBSA. To implement the PPACA, the Department is required to develop and implement over 25 regulations in conjunction with the Departments of Health and Human Services (HHS) and Treasury; implement Multiple Employer Welfare Arrangements (MEWA) reporting and oversight requirements; and design and conduct several health benefit studies, as well as develop and implement education, outreach, and assistance programs and new enforcement strategies. Your audit focused on the Department's responsibilities under the PPACA and your objective was to determine whether EBSA has taken action toward the implementation of the PPACA.

As you know, parallel statutory provisions implementing the PPACA market reform provisions were added to ERISA, the Public Health Service Act, and the Internal Revenue Code. Accordingly, EBSA shares interpretive jurisdiction over the PPACA market reforms with the Department of Health and Human Services and the Department of the Treasury (including its Internal Revenue Service).¹ Regulations are developed and issued jointly by the three Departments.

OIG's RECOMMENDATIONS

Recommendation 1: Work with the Departments of HHS, Treasury, and the Office of Management and Budget (OMB) to establish specific timetables to respond to public comments and issue final regulations.

EBSA will engage in discussions with the other two Departments and OMB regarding timetables. These discussions typically take place through the semi-annual regulatory agenda decision-making process.

Recommendation 2. Incorporate PPACA requirements immediately into the enforcement program to assist plans in complying with PPACA.

EBSA believes its approach to enforcing operative provisions of the PPACA is appropriate. EBSA officials explained to the Inspector General (OIG) auditors that the three Departments' initial approach to ACA implementation, as stated in Question 1 of the September 20, 2010 "Affordable Care Act Implementation FAQs Part 1," is to assist plans, issuers, and others in understanding the new rules and achieving compliance rather than to immediately begin imposing penalties for violations of the ACA.² EBSA officials explained that the agency's initial focus was on developing regulations and related sub-regulatory guidance. The agency had also engaged in substantial compliance

¹ The three Departments are required to coordinate interpretations and enforcement activities under Part 7 of ERISA, title XXVII of the Public Health Service Act, and chapter 100 of the Internal Revenue Code (including the PPACA health reform provisions, which were added to those sections) pursuant to an Inter-Agency Memorandum of Understanding. See 64 FR 70164 (December 15, 1999).

² Specifically, this FAQ states:

Q1: Under the Affordable Care Act, there are various provisions that apply to group health plans and health insurance issuers and various protections and benefits for consumers that are beginning to take effect or that will become effective very soon. What is the Departments' basic approach to implementation?

The Departments are working together with employers, issuers, States, providers and other stakeholders to help them come into compliance with the new law and are working with families and individuals to help them understand the new law and benefit from it, as intended. Compliance assistance is a high priority for the Departments. Our approach to implementation is and will continue to be marked by an emphasis on assisting (rather than imposing penalties on) plans, issuers and others that are working diligently and in good faith to understand and come into compliance with the new law. This approach includes, where appropriate, transition provisions, grace periods, safe harbors, and other policies to ensure that the new provisions take effect smoothly, minimizing any disruption to existing plans and practices.

assistance and outreach efforts to the public, separate from investigations.³ At the same time, investigative support tools were being developed and investigative staff were undergoing training to enforce the new provisions in a consistent, informed manner. As requested by the OIG, EBSA provided the dates PPACA field training was conducted. EBSA also developed a comprehensive PPACA enforcement checklist to promote consistent investigations. The checklists drew in part from the Departments' expertise in the growing body of regulations and public guidance. After multiple rounds of training, refinement of a PPACA enforcement checklist, and internal guidance, EBSA elected to phase in PPACA enforcement as a component part of its FY 2012 Health Benefits Security Project. Through this national enforcement project EBSA expects to investigate a large number of health plans. These investigations will provide meaningful feedback on PPACA compliance after plans and insurers have had the opportunity to process the implementing regulations and related guidance and benefit from EBSA's extensive outreach.

Recommendation 3. Determine benefits typically covered by employer-sponsored plans and provide this to HHS.

The DOL's April 2011 report to HHS ("the report"), together with its associated supporting material, fully satisfies the requirements of PPACA Section 1302(b)(2)(A). This section provides as follows:

The Secretary [of HHS] shall ensure that the scope of the essential health benefits under paragraph (1) is equal to the scope of benefits offered under a typical employer plan, *as determined by the Secretary [of HHS]*. To inform this determination, the Secretary of Labor shall conduct a survey of employer-sponsored coverage to determine the benefits typically covered by employers, including multiemployer plans, and provide a report on such survey to the Secretary [of HHS].

The italicized language clearly requires the Secretary of HHS, rather than the Secretary of Labor, to determine the scope of benefits offered by a typical employer plan. The stated purpose of the Secretary of Labor's survey is to inform this determination. Congress' plain intent was for the Secretary of HHS to use the survey in deciding whether a given benefit is offered under a "typical employer plan."

The survey is based on the National Compensation Survey, conducted regularly by the Department's Bureau of Labor Statistics. Using a large, nationally representative sample of employers, the NCS collects detailed information on whether particular benefits are included in employer health plans. By measuring the incidence of a broad range of different benefits, the Department's survey will allow the Secretary of HHS to determine which are offered by a typical employer plan.

³ Materials provided to OIG indicated that outreach events by EBSA National Office staff (not including Regional-Office-led outreach by customer service staff) exceeded two (2) events per week.

The OIG faults the report for not expressly stating which benefits are "typical." However, the statute does not require the DOL to determine a specified threshold of incidence above which (and only above which) the benefit should be considered "typical" by HHS. DOL's report, by providing detailed data on the incidence of different benefits, fulfills the statutory purpose and requirements without taking on the function of the Secretary of HHS. DOL also disagrees with the OIG's assertion that DOL's approach to the report could impair the public comment process. The report and associated supporting materials are easily available to the public. Commenters are free to provide their views on the survey and on what benefits are offered by a typical employer plan. In addition, in her press release thanking the DOL following the transmittal of our report, Secretary Sebelius stated that HHS will be collecting public comments as they consider how to determine the scope of essential benefits.⁴

Recommendation 4. Proceed with rulemaking relative to PPACA section 6604.

EBSA will reevaluate its initial determination that regulations under PPACA section 6604 were not immediately necessary to implement the requirements of PPACA section 6604 in light of other priorities. EBSA will set a reasonable timeline for such regulations, taking into account all PPACA priorities.

We appreciate the opportunity to provide our comments to the draft report and hope that they will be helpful to you in developing a final document.

⁴ See <http://www.hhs.gov/news/press/2011pres/04/20110415b.html>.